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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KEVIN QUOC TRAN,

Cross-Complainant and Respondent,

v.

HIEU LAM et al.,

Defendants and Appellants.

G055981

(Super. Ct. No. 30-2014-00750072)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James L. Crandall, Judge. Reversed with directions.

Russo & Duckworth and J. Scott Russo for Cross-Defendants and Appellants.

Kenneth A. Reed, for Cross-Complainant and Respondent.

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A jury found that appellants Hieu Lam and Chris Lam made misrepresentations to respondent Kevin Quoc Tran, and the misrepresentations were made with reckless disregard for the truth. It awarded Tran compensatory and punitive damages, assessing differing amounts against Hieu and Chris.¹ On appeal, appellants contend insufficient evidence supported the jury's finding that Hieu made misrepresentations to Tran because the uncontradicted evidence showed only Chris made the misrepresentations. Appellants also contend the trial court erred in denying their motion for judgment notwithstanding the verdict (JNOV) (Code Civ. Proc., § 629) on the punitive damages award because Tran failed to present any evidence about their current financial conditions, and nothing legally precluded him from presenting that evidence. As explained further below, appellants' contentions are meritorious. Accordingly, we reverse the judgment against Hieu on all claims, and reverse the punitive damages award against Chris.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *Hieu's Complaint Against Tran*

Hieu filed a First Amended Verified Complaint alleging a quiet title cause of action against Tran, his wife Linh Tran, and other defendants, including SoCal Brothers Properties, LLC (SoCal Brothers) and Maddex Financial, LLC (Maddex). The complaint alleged that Hieu's brother Chris had forged deeds to convey Hieu's property, a single family residence located on Ambrose Lane in Huntington Beach (the "Ambrose property"), to SoCal Brothers in February 2005, and then from SoCal Brothers to Maddex in January 2006, without Hieu's knowledge or consent. Hieu's signature was needed because he holds a partial interest in both SoCal Brothers and Maddex. The

¹ At various points, we refer to the parties by their first names for clarity and ease of reference. We intend no disrespect.

complaint further alleged that in January 2007, Tran offered to purchase the Ambrose property from Hieu for \$1.05 million. Because Tran claimed his funds were tied up in other real estate projects, Tran and Hieu entered into an oral agreement whereby Tran would occupy the Ambrose property as a “tenant,” directly paying the mortgage payments and real property taxes instead of making rental payments to Hieu, until Tran completed the purchase by securing a new purchase loan and paying Hieu \$183,000. Despite the purchase agreement, the complaint alleged that in February 2007, Tran persuaded Chris to forge Hieu’s signature on a grant deed purporting to transfer title in the Ambrose property from Hieu to “Kevin Tran, a married man as his sole and separate property.” The complaint further alleged that after Tran learned that Maddex held title to the Ambrose property, Tran persuaded Chris to forge Hieu’s name on a deed purporting to transfer title from Maddex to Hieu. The complaint sought a judgment declaring all the forged deeds void and restoring possession of the Ambrose property to Hieu.²

On July 5, 2016, judgment was entered in favor of Hieu and against Tran, among others, on the quiet title claim. Tran was evicted from the Ambrose property on September 14, 2016.

B. Tran’s Cross-Complaint Against Hieu and Chris

1. First Amended Cross-Complaint

In the interim, Tran and Linh filed a cross-complaint against Hieu, Chris, their brother Tony Van Lam (collectively “the Lams”), SoCal Brothers, Maddex and LEK Investment, LLC (LEK).³ In the First Amended Cross-Complaint (FACC), Tran alleged that he entered into an oral agreement with the Lams to purchase the Ambrose property in exchange for assumption of the first trust deed, which exceeded \$700,000,

² Hieu initially alleged a fraud claim against Tran, but voluntarily dismissed it.

³ The jury found against Linh Tran on all her claims against cross-defendants, and in favor of Tony Lam on all claims. Neither Linh Tran nor Tony Lam is a party to this appeal.

plus an additional \$300,000 for services Tran provided to the Lams and LEK. The FACC further alleged the Lams perpetrated a fraudulent scheme whereby Chris would admit to being a habitual forger who forged Hieu's signature on various grant deeds, and Hieu would "cry foul" and reclaim the real property based on the forged deeds. The FACC alleged the Lams committed fraud by forging the grant deeds and using the forged documents to "trick the Trans into buying the Ambrose house [and] then fleec[ing] the Trans by claiming the purchase was unlawful because of the forged documents." It further requested damages based on the \$300,000 Tran spent to improve the Ambrose property after relying on the Lams' misrepresentations that the purchase agreement was valid.⁴

2. Tran's Testimony

A jury trial was held on the FACC in September 2017. At trial, Tran testified he met Chris in 2006 through a mutual friend, and he later met Tony and Hieu. Tran negotiated with Chris to purchase the Ambrose property. He believed the Ambrose property belonged to all three Lam brothers, and that Chris was representing the Lams. The terms of the oral agreement to purchase the Ambrose property required the Lams to pay off the second mortgage on the property, and in exchange Tran would assume the other loan and pay the various expenses, including property taxes and homeowners insurance. Tran testified the oral agreement did not require him to make any payments to Hieu. Tran also testified he could not assume the loan because the Lams had not paid off the second mortgage.

Tran admitted he never spoke with Hieu about purchasing the Ambrose property, and never talked with Hieu before moving into the property. Tran did not move

⁴ Although the FACC alleged a cause of action for breach of an oral agreement to sell the Ambrose property, following presentation of evidence, the court granted a motion for directed verdict and nonsuit on that claim. Tran does not challenge the court's ruling on appeal.

immediately into the Ambrose property, but had it remodeled. Later, after he moved into the property, he added an extra bedroom in 2008 or 2009. After adding the room, Tran had a discussion with Hieu about the oral agreement to purchase the Ambrose property. Tran told Hieu, “I thank you that you can sell the house to me, to my families.” Tran denied telling Chris that his wife Linh needed to see a deed to the Ambrose property. He denied being present when Chris signed the February and April 2007 deeds.

3. Linh Tran’s Testimony

Tran’s wife Linh testified that Chris was “really close” to her family and the “godfather for all my four children.” After the Trans moved into the Ambrose property, on several occasions, Chris told Linh that “it was my house.” Linh acknowledged she had no direct knowledge about the terms of the oral agreement to purchase the Ambrose property, and she based her knowledge about the oral agreement on what her husband had told her. Linh admitted Hieu, Tony, and Chris made no representations to her about the purchase of the Ambrose property. Linh also admitted she and her husband never made any payments to Hieu. She estimated the total cost of all the renovations and remodeling was \$235,000.

4. Hieu’s Testimony

Hieu, who was 35 years old at the time of trial, testified he had purchased real properties throughout Southern California. He denied signing deeds transferring the properties to SoCal Brothers. Hieu eventually lost all these properties, and his credit was damaged as a result.

In June 2004, while in college, Hieu purchased the Ambrose property in his name only. He lived in the house for a few years before orally agreeing to sell it to Tran. At the time, Hieu thought the house was worth \$1.05 million. According to Hieu, he and Tran agreed that Tran “could rent the house out until he was able to purchase it.” Hieu explained he never spoke with Tran “face to face,” and that Chris and Tran negotiated the

terms of the deal. After Tran moved into the property, Tran began making payments to the mortgage company, but he never assumed the loan on the property.

Hieu acknowledged visiting the Ambrose property on at least one occasion after Tran began renting it. He noticed the interior of the house and backyard had been remodelled. When he obtained the Ambrose property back from Tran, all the new appliances and “outdoor barbecue stuff” had been removed. Hieu also discovered \$5 million in liens against the property.

Hieu acknowledged signing documents without reading them because Chris told him to do so. Hieu testified, however, that he did not sign a deed transferring the Ambrose property to SoCal Brothers in 2005. According to Hieu, he was not aware that Chris had forged his signature on numerous documents. He discovered the forgeries as a result of a 2014 lawsuit involving his brother. After Hieu learned that Chris had forged the deeds, he was so angry that he “wanted to punch [Chris] in the face.”

5. Chris’s Testimony

Chris testified the Lams purchased and sold houses. On several occasions, Chris signed his brothers’ names on various documents, including deeds, because his brothers were busy with other work. He testified the Lams lost all these properties, either through foreclosure or short sales.

Chris admitted he negotiated a deal with Tran relating to the Ambrose property; Hieu was not present during the negotiations. Tran agreed to rent the property and later purchase it for \$1.05 million. In lieu of rental payments, Tran agreed to pay all the house expenses, including the mortgage payments and property taxes. Tran informed Chris that Tran would purchase the Ambrose property within a year.

Chris admitted signing Hieu’s name on several documents relating to the Ambrose property, but claimed that he was “tricked” into signing those documents. According to Chris, Tran told him that Linh was stressed and could not sleep at night because she was concerned they had no house. Tran wanted to show her a deed and

promised Chris he would not record it. Chris testified that when he forged Hieu's name on the deed, he "made it clear to Kevin Tran that Hieu was the owner of the [Ambrose] house."

6. Tony's Testimony

Tony testified he began investing in Southern California properties in the mid-2000's. Based on legal advice, he transferred these properties to various LLC's. Tony testified he never asked or authorized Chris to sign his name on any deeds. Tran's attorney asked Tony no questions about the Ambrose property.

7. Jury Special Verdicts

The jury found that Hieu made a false representation of fact to Tran, and that Tran was damaged as a result of his reliance in the amount of \$200,000, with an offset of \$70,000. The jury also determined that Hieu engaged in conduct with malice, oppression, or fraud, and awarded Tran \$750,000 in punitive damages. It also found Chris made a false representation of fact to Tran, and that Tran's reliance on that misrepresentation damaged him in the amount of \$200,000. The jury also determined that Chris engaged in conduct with malice, oppression, or fraud, and awarded Tran \$750,000 in punitive damages.

8. Posttrial Motions

Appellants moved for a JNOV, and alternatively, a new trial. They argued the punitive damages award could not stand because Tran failed to present any evidence of Hieu's or Chris's current financial condition. Hieu separately challenged the sufficiency of the evidence to support the jury's finding that he made a misrepresentation to Tran. He noted that Tran admitted negotiating only with Chris about purchasing the Ambrose property, and the record showed Chris forged the deeds without Hieu's knowledge or consent.

The trial court granted the Lams' motion for a new trial on the issue of punitive damages. It determined Tran failed to present sufficient evidence of the

financial conditions of Hieu and Chris to support a punitive damages award. “However, that is because the court sustained the objection by defense counsel to the question posed by plaintiff’s counsel regarding defendant’s financial condition. Since defendant had not moved for bifurcation the objection was inappropriate and the court should have allowed the inquiry to proceed. Accordingly the court believes the plaintiff did not have ‘a full and fair opportunity to make the requisite showing’, therefore the appropriate remedy is to order a new trial on the issue of punitive damages.” It denied as moot the motion for JNOV. The court also denied Hieu’s challenge to the special verdict on fraud because the court concluded sufficient evidence supported the verdict.

II

DISCUSSION

A. The Evidence Does Not Support the Jury’s Special Verdict Against Hieu

In the special verdict form, the jury was asked: “Did Hieu make a false representation of facts to Kevin Tran?” The jury answered, “Yes.” The jury also found that Hieu made the representation knowing it was false or he recklessly made the misrepresentation without regard for its truth, and that Hieu intended that Tran rely on the representation. As discussed above, Hieu moved for JNOV on the jury special verdict that he made a misrepresentation to Tran. The trial court denied the motion, and appellants appeal the order. “A motion for judgment notwithstanding the verdict may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support.” (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68.) “As in the trial court, the standard of review is whether any substantial evidence – contradicted or uncontradicted – supports the jury’s conclusion.” (*Ibid.*)

Here, the FACC alleged that Tran was fraudulently induced to spend \$300,000 to improve the Ambrose property based upon misrepresentations that he had successfully purchased the property. Tran was the only person to testify about the

misrepresentations. The Lams denied any misrepresentation, and Linh admitted no one made any representation to her about the purchase of the Ambrose property. According to Tran, he never spoke with Hieu during the time he negotiated the purchase of the Ambrose property with Chris. Only after Tran had moved into and completed remodeling the Ambrose property by adding a new room did he speak with Hieu about the purchase agreement. Tran told Hieu, “I thank you that you *can* sell the house to me, to my families.” (Italics added.) Tran did not testify about Hieu’s response to this statement. On this record, insufficient evidence, indeed no evidence, supports the finding that Hieu made a misrepresentation to Tran that he (Tran) had successfully completed the purchase of the Ambrose property. Absent that finding, Hieu cannot be liable for committing fraud against Tran. Accordingly, the trial court erred in denying Hieu’s motion for JNOV on the jury’s finding that Hieu made a false representation of fact.⁵

B. The Evidence Does Not Support the Punitive Damages Award

Appellants in their JNOV and new trial motions challenged the sufficiency of the evidence to support the punitive damages award. The trial court acknowledged insufficient evidence supported the award and granted a new trial, but denied the JNOV motion. Appellants contend the court erred in denying the JNOV motion and allowing a new trial on punitive damages. We agree.

As to Hieu, because we have concluded he cannot be held liable for fraud, no award of punitive damages may be assessed against him. (See *Topanga Corp. v. Gentile* (1967) 249 Cal.App.2d 681, 691 [“tortious act [must] be proven if punitive

⁵ At oral argument, Tran asserted the jury could find Hieu made the alleged representations if it disbelieved Hieu’s and Chris’s testimony. But “the fact that the trier of fact does not credit a witness’s testimony does not entitle it to adopt an opposite version of the facts which otherwise lacks evidentiary support.” (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1205.) To illustrate the point by analogy, if Hieu had testified, “No elephants live in my backyard,” his general lack of credibility would not constitute affirmative evidence an elephant does live in his backyard.

damages are to be assessed”].) The trial court therefore erred in not granting Hieu’s JNOV motion on the punitive damages issue. Thus, only the punitive damages award assessed against Chris remains an issue.

1. Evidence Required to Support a Punitive Damages Award

Civil Code section 3294, subdivision (a), permits an award of punitive damages “for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice.” We review the trial court’s award of punitive damages for substantial evidence. (*Kelly v. Haag* (2006) 145 Cal.App.4th 910, 916.) “An award of punitive damages hinges on three factors: the reprehensibility of the defendant’s conduct; the reasonableness of the relationship between the award and the plaintiff’s harm; and, in view of the defendant’s financial condition, the amount necessary to punish him or her and discourage future wrongful conduct. [Citation.]” (*Id.* at p. 914.) Only the third factor is at issue in this case.

“[T]he function of punitive damages is not served by an award which, in light of the defendant’s wealth . . . exceeds the level necessary to properly punish and deter.” (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928 & fn. 13.) A punitive damage award “can be so disproportionate to the defendant’s ability to pay that the award is excessive *for that reason alone*.” (*Adams v. Murakami* (1991) 54 Cal.3d 105, 110.) Thus, “an award of punitive damages cannot be sustained on appeal unless the trial record contains meaningful evidence of the defendant’s financial condition.” (*Id.* at p. 109.) “Without such evidence, a reviewing court can only speculate as to whether the award is appropriate or excessive.” (*Id.* at p. 112.) The plaintiff who seeks to recover punitive damages bears “the burden of establishing the defendant’s financial condition.” (*Id.* at p. 123.)

The high court has not prescribed a fixed standard for determining a defendant’s ability to pay a punitive damages award, but net worth is the most common

measure. (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 194 (*Soto*); *Baxter v. Peterson* (2007) 150 Cal.App.4th 673, 680 (*Baxter*).) “In most cases, evidence of earnings or profit alone are not sufficient ‘without examining the liabilities side of the balance sheet.’ [Citations.] ‘What is required is evidence of the defendant’s ability to pay the damage award.’ [Citation.] Thus, there should be some evidence of the defendant’s actual wealth. Normally, evidence of liabilities should accompany evidence of assets, and evidence of expenses should accompany evidence of income.” (*Id.* at p. 680.) “Without evidence of the actual total financial status of the defendants, it is impossible to say that any specific award of punitive damages is appropriate.” (*Kenly v. Ukegawa* (1993) 16 Cal.App.4th 49, 58.) “The evidence should reflect the named defendant’s financial condition at the time of trial.” (*Soto, supra*, 239 Cal.App.4th at p. 195.)

Here, the trial court found Tran failed to produce sufficient evidence to sustain an award of punitive damages against Chris, and Tran does not challenge that finding on appeal. Accordingly, the evidence was insufficient to sustain a punitive damages award against Chris.

2. Tran Is Not Entitled to a New Trial on Punitive Damages

When a punitive damages award is reversed based on the insufficiency of the evidence, the issue of punitive damages cannot be retried, unless the plaintiff lacked “‘a full and fair opportunity to make the requisite showing.’” (*Soto, supra*, 239 Cal.App.4th at p. 195.) Tran argues he is entitled to a new trial on punitive damages because the trial court precluded him from questioning Chris about his current financial condition.

a. Relevant Facts

Hieu was the first of the three Lam brothers called as witnesses in Tran’s case-in-chief. Hieu testified he and his brothers started several different companies, including a computer company called Sanworks. On redirect examination, Hieu testified

he worked at Sanworks while in college and to this day. The following colloquy then occurred:

“Q: ON AVERAGE, HOW MUCH DID YOU MAKE AT SANWORKS A YEAR BEFORE YOU GRADUATED COLLEGE?

“MR. RUSSO [Lams’ attorney]: OBJECTION. IRRELEVANT.

“THE COURT: SUSTAINED.

“MR. REED [Tran’s attorney]: THANK YOU. I HAVE NO FURTHER QUESTIONS.”

Tran’s attorney then called Chris as a witness. Neither Tran’s attorney nor Chris’s attorney asked any question about Chris’s current financial condition. Chris’s attorney never objected to any question even remotely related to financial issues.

Finally, Tony was called as a witness. During direct examination of Tony, the following colloquy occurred:

“Q. EVEN IN YOUR 20’S, BACK WHEN YOU BOUGHT THESE PIECES OF PROPERTY, YOU WERE WORKING AT SANWORKS AT THE TIME, RIGHT?

“A. THAT’S RIGHT.

“Q. AND I THINK YOU SAID SANWORKS WAS DOING REALLY WELL. AND THAT MAY BE MY WORD. I THINK YOU SAID SANWORKS WAS DOING WELL.

“A. IT WAS DOING FINE.

“Q. SO, DOING FINE.

“A. YES, SIR.

“Q. LIKE, HOW FINE?

“MR. RUSSO: OBJECTION. IRRELEVANT.

“THE COURT: SUSTAINED.”

Tran's attorney followed up by asking, "Fine enough that you could buy properties in your 20's?" Tony replied by explaining that "back then, it didn't cost a lot of money to buy properties."

At the hearing on the JNOV motion, Tran's attorney argued there was no evidence of the financial condition of any of the Lams in the trial record because their attorney had "objected to it and you sustained the objection." When the trial court noted it could not find in the trial transcript any instance when Tran's attorney asked about net worth, he responded, "Because you . . . already stopp[ed] me from asking questions." The court stated it had sustained an objection to the question about Hieu's salary 15 years ago because "it was an old question about – that was both irrelevant and not related to the issue in the case [or] the amount of net worth that would go to punitive damages." Tran's attorney reiterated: "Your honor, the questions on financial issues, you told me no." The court then explained that when it sustained the objections, it had mistakenly believed that the Lams had bifurcated the issue of punitive damages. It stated: "My feeling at the time I was sustaining that objection, not only because it was remote in time, but that it would be precluded under [Code of Civil Procedure section] 3295, but it wasn't a 3295 case, it wasn't bifurcated." The court decided to grant a new trial on the issue of punitive damages because it concluded that Tran lacked a "full and fair opportunity to make the requisite showing" of Chris's current financial condition.

b. Analysis

When the trial court sustained a relevancy objection to the question about Hieu's past salary, it did so without any explanation or comment. As the trial court later explained, it sustained the relevancy objection because it was "not related" to "the amount of net worth that would go to punitive damages." Put another way, the question about Hieu's salary 15 years ago was not relevant to Hieu's net worth for the punitive damages case; nor was it relevant on whether Hieu committed fraud. Thus, nothing in the record suggested the court would preclude further inquiry into "financial issues."

Indeed, Tran's attorney apparently did not believe he was so precluded because he asked about Sanworks's financial success during his examination of Tony, which occurred *after* he had examined Hieu and Chris.

The record shows Tran's attorney never requested a sidebar to explain why the court should allow him an opportunity to inquire about financial issues relating to Hieu. For example, although the question was not directly relevant to Hieu's current financial condition, counsel could have argued he was laying a foundation for further inquiry to prove his punitive damages case against Hieu. (See Evid. Code, § 354 [no judgment or decision will be reversed because of an erroneous exclusion of evidence unless there has been a miscarriage of justice and the record shows "[t]he substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means"].) Sustaining a relevancy objection to a question about Hieu's salary 15 years earlier simply does not show the court precluded Tran from eliciting evidence of Chris's current financial condition. Thus, the court erred in granting a new trial on punitive damages on the basis that Tran had been denied the opportunity to make the requisite showing of Chris's financial condition.

On appeal, Tran contends the doctrine of invited error supports the trial court's order granting a new trial. According to Tran, the Lams' failure to bifurcate the issue of punitive damages led to the court's evidentiary rulings, and therefore the Lams should be estopped from challenging the court's order. Tran's argument is meritless. The Lams had no legal obligation to bifurcate the trial. Nor were they responsible for the trial court's evidentiary rulings. Finally, we note the trial court properly sustained the relevancy objections because, among other reasons, the questions did not seek current financial information. As the court properly determined, the questions asked about an "old" issue that was "remote in time."

In sum, Tran did not present sufficient evidence to support an award of punitive damages against Chris. The record shows he was not precluded from presenting

evidence of Chris's current financial condition either by the trial court or by the Lams.⁶ Thus, we conclude the trial court erred in denying Chris's JNOV, and no retrial is required.

III

DISPOSITION

The trial court's order denying the JNOV motion and granting a new trial on the issue of punitive damages is reversed. The court's order denying JNOV on the issue of Hieu Lam's liability for fraud is reversed. The matter is remanded with instructions to enter an order granting the JNOV motion on both issues. Appellants are awarded their costs on appeal.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.

⁶ At this point it's worth emphasizing that we are tethered to the record in resolving appellate claims. This, of course, is an orderly and fair means to decide appeals, and the record nearly always gives us an adequate understanding of what took place below. But occasionally not all of our questions are answered. This is one of those cases. For example, was there an unreported discussion about bifurcating the punitive damages portion of the trial that led to a misunderstanding about the issue? Why did the trial court believe bifurcation had occurred? Why wasn't the matter discussed during trial? The record provides no answers to these questions. Nevertheless, we must decide the matter on the record the parties have given us.

BEDSWORTH, J., Concurring:

This is an unsettling case, and I am disturbed by its result. But the opinion is legally correct, so I have no choice but to join in it.

What disturbs me is the problem I imagine plaintiff's counsel will have explaining to his client how the judge could have made a mistake, admitted he made a mistake, and yet there is no remedy for it – no chance to correct the judge's error. That is what happened here, but I have to join in the majority opinion because there is less here than meets the eye – at least less than is contained in that description of the case.

It is true that at the posttrial motions for judgment notwithstanding the verdict (JNOV) and new trial, the court admitted it had mistakenly believed the punitive damages part of the trial had been bifurcated. So when plaintiff's counsel asked about defendants' earnings when they got out of college, the judge sustained the objections because he thought the questions sought information that was too remote to be relevant and because he mistakenly thought the issue had been bifurcated out of the present proceedings.

Because of this mistake about bifurcation, the judge later said, "I probably would have sustained more had you gone down the road and pressed . . . [¶] So I think you were precluded from getting into that."

The first ruling – that the information sought was too remote – was well within his discretion. While counsel may well have asked the question as a foundational one to begin the defendant's journey through a long employment and earnings history (which would have been relevant), he made no such offer of proof. So all we have to review is a perfectly valid and legally correct exercise of discretion by the trial court.

After the fact, at the posttrial motions, we learned that the judge would have erroneously prohibited any inquiry into that area because of his misapprehension of the procedural posture of the case. But no such ruling was ever made. All that *actually*

took place was that counsel twice asked a defendant about his early earning history, objections were sustained to both questions, and the matter never came up again. Counsel asked a reasonable question, the judge made a reasonable ruling, and we ended up with reversible error.

That's disturbing. And what disturbs me most is that we do not accept the trial judge's own evaluation of the circumstances. Having presided over the trial, having developed a much fuller and more nuanced understanding of the course of the trial and his dealings with counsel than we can, he denied the JNOV on punitive damages – rather clearly out of a sense of fairness considering his own misunderstanding of its procedural posture. I applaud him for that, but I cannot find any legal support for it. As my colleagues point out, no erroneous ruling was ever made.

And because no erroneous ruling was made, there is no basis for reversal. In this unusual case, that offends my sense of fairness. Plaintiff's counsel skillfully played an unpromising hand to a successful conclusion and now loses a portion of that victory through what I can only view as the legal equivalent of von Clausewitz's "fog of war."

But the law is not designed to accommodate my sense of fairness. Neither I nor my colleagues nor any of the courts before us who have dealt with similar issues have found a basis for a different resolution. I defer to the collective wisdom of 150 years of precedent and join in the opinion.

BEDSWORTH, J.